IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA Nos. 63 & 67 of 1995.

Judgement reserved on: 1.12.2006.

Date of decision: 22.12.2006.

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1. **RSA No. 63 of 1995.**

   Jai Dassi & ors. …..Appellants.

   VERSUS

   Smt. Neelmani & ors. …..Respondents.

2. **RSA No. 67 of 1995.**

   Param Dev & ors. …. Appellants.

   VERSUS

   Smt. Neelmani & anr. …. Respondents.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : Mr. B.K. Malhotra, Advocate in both the appeals.

For the Respondents : Mr. Ashwani Kumar Sharma, Advocate, in both the appeals.

Surjit Singh, Judge.

By this common judgement, two appeals, i.e. RSA Nos. 63 of 1995 and 67 of 1995, are being disposed of, as both the appeals have been admitted on the very same substantial questions of law, which are as follows:-

1. Whether the possession of a co-owner against the other co-owner on the basis of adverse possession matures into title unless the ouster is proved?

Whether the reporters of the local papers may be allowed to see the Judgment?

2. Whether in the event of reaching the conclusion on appraisal of the material on record that private partition between the co-owners has not been proved, a decree of declaration on the basis of adverse possession against a co-owner can be passed.
3. Whether a mere non-participation in profits of the property by one co-owner and exclusive possession by the other lead to a inference of ouster in the absence of an open and unequivocal repudiation of title of the co-owner to his knowledge?
4. Whether a suit for declaration could have been filed beyond a period of three years after the order of the A.C. Ist Grade, in a partition proceedings, that a question of title is involved in the case?

2. Facts relevant for the disposal of the two appeals may be noticed. Respondents- plaintiffs, in both the appeals, filed two separate suits for declaration that they were exclusive owners in possession of the property, described in the plaints, and that the entries in the revenue papers, showing appellants- defendants as joint owners with them, were wrong and illegal and of no consequence qua their right, title and interest in the suit property. It was alleged that some of the appellants-defendants and the predecessor in interest of the other appellants-defendants had earlier filed a joint application against the respondents- plaintiffs for the partition of the suit property, alleging that they were joint owners to the extent as recorded in the revenue papers. Respondents- plaintiffs contested that application and pleaded that they were in exclusive possession of the suit land and challenged the entries in the revenue

record, showing the appellants- defendants as joint owners in possession. The Revenue Officer, i.e. Assistant Collector Ist Grade, Mandi, vide order, dated 30.6.1979, declined to pass any order on that application for partition, till the question of title raised by the plaintiffs, was adjudicated by the civil suit. Despite passing of that order by the Assistant Collector Ist Grade, Mandi, appellants-defendants did not file any suit for declaration of their alleged title, as joint owners of the suit property. Plaintiffs- respondents claimed that the property had fallen to their share in a private partition, about 50-55 years back and in case the private partition was not proved, they having remained in exclusive possession for more than 12 years and their possession being open, continuous, peaceful and hostile, they had acquired title by adverse possession and that their exclusive possession with a hostile assertion amounted to ouster of the appellants- defendants.

3. Appellants-defendants contested the suit. They denied that any private partition, as alleged by the respondents- plaintiffs, had taken place. It was also denied that the plaintiffs had acquired title by adverse possession.

4. Parties went to trial, at the end of which the learned trial court concluded that no private partition had taken place between the parties. However, plea of adverse possession raised by the plaintiffs-respondents, found favour with the trial court and consequently, the suit was decreed and a declaratory decree was passed that the respondents- plaintiffs had acquired title by way of adverse possession and by way of further relief permanent injunction was also

granted restraining the appellants- defendants from causing any interference in the possession of the plaintiffs-respondents. Trial court gave the reason that in the reply filed by the plaintiffs-respondents in the year 1974 to the partition application of the appellants-defendants, plea of adverse possession had been set up and a period of 12 years had lapsed since the setting up of the aforesaid plea and hence the plaintiffs-respondents had acquired title by prescription.

5. Appellants-defendants went in appeal to the court of District Judge. Appeal has been dismissed by upholding the finding and the reasoning of the trial court. This Court admitted both the appeals on the aforesaid questions of law.

6. It is well settled principle of law that a co-owner in possession holds the property for himself as an owner and also on behalf of other co-owners as their trustee, and if he wants to deprive the co-owners, out of possession, of their title, he has to set up the plea of ouster, which means that he has to declare to the knowledge of the co-owners out of possession that he no longer holds the property as a co-owner but as an exclusive owner and also does not allow the other co-owners to enjoy the property or its fruits alongwith him. It has to be specifically pleaded in a case of ouster that at some given point of time the title of the co-owners had been denied to their knowledge. In the present case, the respondents-plaintiffs did not plead the requisite particulars of plea of ouster. They took the plea of adverse possession, vide para-4, which is reproduced below for ready reference:-

> "That the plaintiff is owner in possession of the suit land, as it is not joint and has already been partitioned as submitted above and in case plaintiff fails to prove partition then plaintiff being in open, continuous hostile, peaceful and exclusive possession of the suit land so he has become its owner by virtue of adverse possession in the alternative and plaintiff had maintained his exclusive possession over suit land in open assertion of hostile title till today to the actual knowledge of the defendants, by ousting them."

7. As is clear from a bare reading of the above reproduced para-4 of the plaint, the plaintiffs-respondents did not state as to when did they oust the appellants-defendants from the joint ownership of the suit property or when did they declare to the knowledge of the appellants- defendants that they had been possessing the suit land in their own right and not as co-owners. Thus, the plaintiffs-respondents cannot be said to have raised the plea of ouster to claim title to the suit property to the exclusion of the appellants- defendants, on the basis of adverse possession.

8. Hon'ble Supreme Court in **MD. Mohammad Ali (dead) by LRs**. vs. **Jagadish Kalita and others** [2004 (1) SCC 271], while dealing with a case where a co-sharer in exclusive possession set up the plea of adverse possession, observed as follows in para-19:-

> "Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to (sic) a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a construction (sic. The word should have been constructive) trustee of other co-sharer and the right of

the appellant and/ or his predecessors-in-interest would, thus, be deemed to be protected by the trustees……"

9. The two courts below have held on the basis of the reply filed by the respondents- plaintiffs in the partition case before the Revenue Officer that title of the appellants- defendants as joint owners had been denied to their knowledge and this amounted to an ouster. The plea that was taken by the respondents- plaintiffs in the reply to the application for partition, is contained in para-3 thereof, which is reproduced below:-

"In reply to this para, it is submitted that there is no dispute regarding anything, with regard to this land. The applicants are taking undue advantage of the wrong revenue entries regarding the joint ownership of the parties and are creating this dispute to establish their right. The land in dispute has already been partitioned about 40/45 years ago and is not joint and the entire land in dispute had fallen to the share of replying respondent No.1. Further more the applicants No.1 and 3 are adoptees in other family and as adoptees they have lost all their rights in the natural family including the right of claiming any share in the land in dispute. It is further submitted that replying respondent No.1 has been in exclusive possession of the land in dispute after the private partition for more than 12 years. The other party had full knowledge and notice of that partition. The possession of the respondents has therefore matured into ownership by adverse possession as well and the right, title and interest of the applicants, if any, had extinguished. The replying respondent No.1 have also effected major improvements in the land in dispute by spending about Rs.10,000/- and acquiring proprietary rights of the land solely. As such the land in dispute is

> not liable to be partitioned. There is a question of title involved in the proceedings and so long the same is determined and decided by a competent court, this court has got no jurisdiction to entertain and try this application."

10. It is clear from a bare reading of the above reproduced portion of the reply filed by respondents- plaintiffs in response to partition application that what they pleaded was that a private partition had already taken place and that they having remained in possession for more than 12 years after the alleged private partition, had acquired title by adverse possession. These facts cannot be said to constitute a plea of an ouster. The denial of title of the appellants-defendants in the said reply also does not amount to the plea of ouster, because their title was denied on the plea that a private partition had taken place and in that partition, the entire suit property had fallen to the share of the plaintiffs- respondents. Admittedly, the plea of private partition set up by the respondents- plaintiffs has been dismissed by the two courts below and the finding has not been challenged by the respondents-plaintiffs.

11. It is true that the appellants- defendants have not been participating in the profits of the property but that by itself does not make the respondents- plaintiffs owners by adverse possession of their (appellants') recorded share in the suit property.

12. As a result of the above stated position, it is held that plea of ouster having not been set up and established, the two courts below were not justified in holding that the respondents- plaintiffs had acquired title by adverse possession with regard to the recorded

shares of the appellants- defendants. Consequently, questions No. 1, 2 and 3, are answered in favour of the appellants.

13. As regards question No.4, defendants- appellants nowhere pleaded that suit as filed by the respondents-plaintiffs was barred by time on account of its having been filed beyond a period of three years after the passing of the order by the Assistant Collector Ist Grade, on the application for partition, whereby he declined to partition the property until question of title was got adjudicated from the civil court. Otherwise also, limitation is not to be counted from the date of the order of Assistant Collector Ist Grade, for seeking declaration of title. Hence, the question is answered against the appellants.

14. In view of the answers to Questions No. 1 to 3, both the appeals are accepted. The judgements and decrees of trial court in both the cases, as affirmed by the first appellate court, thereby decreeing the suits of the respondents- plaintiffs, are set-aside and both the suits are dismissed.

December 22, 2006. **(Surjit Singh)**
(*Hem*) **Judge.**